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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 94-46

In the Matter of)

Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)

Implementation of Section 309(j))
of the Communications Act--)
Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

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COMMENTS

Source One Wireless, Inc. ("Source One"), an Illinois corporation, submits these
its Comments in connection with the Interim Licensing Proposal in the above-referenced
Notice of Proposed Rule Making ("NPRM" or "Notice"), FCC 96-52, released February
9, 1996.

Background

On February 9, 1996, the Commission released the NPRM, proposing interim
rules for paging licensing. Initially, the Commission suspended acceptance of new
applications for paging channels. The Commission also stated that it would allow
incumbent licenses to add or modify sites within the interference contour of existing
systems. The Commission proposed interference protection for 929 MHz licenses on the
same basis as Part 22 licensee.

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The Commission also proposed that incumbents be allowed to file new applications to expand or modify their systems beyond their existing interference contours with modifications, but would receive only secondary use authorization. The Commission requested comments on limitations on secondary licensing.

The Commission stated that it would process applications that were not mutually exclusive with other applications as of the Notice adoption date and the period for filing competing applications had expired as of the adoption date of the Notice.

The Commission further proposed the continuation of the stay on 931 MHz frequencies, processing the 931 MHz applications pending prior to the adoption date of the Notice and for which the 60-day window for filing competing applications had expired, retaining those mutually exclusive applications for competitive bidding. Likewise it would process non-mutually exclusive VHF and CCP applications provided that the window for filing competing applications had closed.

The Commission proposed the processing of non-mutually exclusive PCP applications that were filed before the adoption date of the Notice. In connection with requests for conditional and permanent exclusivity that are pending under current PCP exclusivity rules, the Commission stated that consideration of such requests should be postponed during this proceeding.

Finally, the Commission stated that it would continue to process pending applications for non-exclusive PCP channels, pending the outcome of this proceeding.

Introduction

Source One is a paging company based in Illinois. It began as a paging operator in 1993 in the Chicago metropolitan area and in portions of six states (Minnesota, Wisconsin, Illinois, Indiana, Michigan and Missouri). It now has expanded to many locations through-out the United States, chiefly on the frequency 931.1875 MHz.

Discussion

I. Source One is Opposed to the Freeze

Source One is very much opposed to the freeze on applications for paging channels for existing licensees for many reasons: The most important is that paging frequencies are mature frequencies, in that they have been in the marketplace for over 40 years. The Commission itself stated in the NPRM at page 5 that some of these frequencies were allocated as long ago as 1949, with the most recent allocations made in 1982: 14 years ago! Freezing these frequencies to assess their value as auction opportunities is analogous to a government, long after the occupant has bought a house, coming in and assessing the air rights around the house and stating, in essence, if you don't or can't purchase it, we'll sell it to someone else, but you can't add a second floor if you have more children or even modify the roof to add a skylight. The time is long passed for such evasive action and although some initial applicants or application companies may have caused the appearance of available frequencies, the Commission must be aware that in most major metropolitan areas, there are no paging frequencies available.

The Commission should admit that the auction opportunities are gone and lift the freeze insofar as existing licensees go. If, however, the Commission continues the freeze, Source One proposes that it be a limited freeze for existing licensees: that they be allowed to add locations or modify facilities on a primary basis as long as their existing service or interference area contours overlap.^{1/} This would serve the public interest in providing more efficient and effective coverage to existing subscribers, while granting incumbent licensees the flexibility that the Commission has stated the licensees should have. As another alternative, Source One proposes that the Commission give incumbent paging licensees a window of opportunity, as it did for existing MDS licensees during its

^{1/} Source One Wireless, Inc. also proposes, and will address more fully in its Comments to the NPRM as a whole, that an existing licensee on a frequency which has 70% or more contour coverage of a geographic market be exempt from any auction.

freeze, expanding the protected service area and giving a 90-day window to make necessary system changes, prior to the effective date of the new Rules.

2. Private and Common Carrier Applicants Must be Treated Similarly

If the Commission continues the freeze, Source One submits that 931 MHz and 929 MHz existing licensees must be treated equally relating to interim license processing. To accept 929 MHz applications for processing as of the date of the NPRM while processing only the 931 MHz applications pending as of 60 plus days prior is not providing an equal playing field for 929 and 931 frequencies, which the Commission has so hardily embraced in the CMRS proceedings. The action of excluding more than two months of pending applications for 931 MHz does not have precedent in other frequency freezes and raises serious issues regarding retroactivity. In Bowen v. Georgetown University Hospital, 488 U.S. 204, 209 (1988), the Court stressed that "Retroactivity is not favored in the law" and stated that there must be substantial justification, for retroactive rulemaking authority. In Landgraf v. Film Products, 114 S.Ct. 1483, 1497 (1994), the Court reiterates as it did in Bowen that the presumption is against statutory retroactivity which is founded upon "elementary consideration of fairness" dictating that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." The Court states in Landgraf that this presumption against statutory retroactivity is deeply rooted in the Supreme Court's jurisprudence and "finds expression in several constitutional provisions." This present action would penalize existing licensees who were attempting to serve the public interest by providing expanded customer service but were not given the elementary consideration of fairness by acceptance for processing of their timely filed applications.

3. 929 MHz Licensees Should Have Interference Protection

Source One agrees with the Commission that interference protection should be given to 929 MHz licensees in the same manner as Part 22. However, Source One seriously opposes the application of the proposed standards to previously licensed

facilities. Since these charts are based on an average of height and power (1,000 watts, 1000 feet), as the height is lowered, the service and interference contour contract., which of course reduces previously authorized areas. Source One proposes that existing 929 and 931 MHz facilities be grandfathered with a 20 mile service area contour and a 50 mile interference contour. Further, Source One submits that existing interference contours must be protected since fill-in transmitter sites built during this interim period in this contour will be caused interference, if and when an auction winner begins operation. To do otherwise would be a de facto modification of an licensee's authorization, a taking, which raises serious equitable considerations. Business decisions have been made and money invested in reliance on the existing standards. Compare 47 U.S.C. 613. Auctions were not meant to harm existing licensees or substitute for rational policy decisions. The existing licenses have provided the public with a variety of services, have helped the economy by employing workers and purchasing goods and services to operate their businesses.

Conclusion

Source One respectfully requests that the Commission take these Comments into consideration in connection with the proposed rule making.

Respectfully submitted,

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